IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION NO.31 OF 1983

THE HON'BLE MR. JUSTICE Y.B. BHATT:

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1. Whether Reporters of Local Papers may be allowed to see the judgement?

2. To be referred to the Reporter or not?

3. Whether their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

Appearance:

Mr. R.L. Mehta, advocate for the petitioners.
Mr. P.M. Raval, advocate for the respondents.

CORAM: Y.B. BHATT J.
Date of Decision: 16-01-1996

JUDGEMENT

1. The present petitioners are the original defendant nos.1 and 2 (tenant and sub-tenant respectively); whereas the opponents are the original plaintiffs-landlords.

2. Before proceeding with the contentions raised in the

present revision, it must be kept in mind that the present revision is one under section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. In the context of the powers of the High Court exercisable in such revisions, the ratio laid down by the Supreme court in the case of Helper Girdharbhai (AIR 1987 SC 1782) is most relevant. In the said decision the Supreme Court has observed in substance that in exercising revisional power under section 29(2) the High Court must ensure that the principles of law have been correctly borne in mind by the lower court. Secondly, the facts have been properly appreciated and a decision arrived at taking all material and relevant facts in mind. In order to warrant interference, the decision must be such a decision which no reasonable man could have arrived at. Lastly, such a decision does not lead to a miscarriage of justice. But, in the guise of revision, substitution of one view where two views are possible and the Court of Small Causes has taken a particular view, is not permissible. If a possible view has been taken, the High Court would be exceeding its jurisdiction if it substitutes its own view in place of that of the courts below because it considers it to be a better view. The fact that the High Court would have taken a different view is wholly irrelevant.

2.1 It must also be noted that in the case before the Supreme Court, the findings of the trial court were reversed in appeal, and it was the appellate decision which was before the High Court. The High Court in the revision under section 29(2) reversed the finding. Thus, in the revision before the High Court, it was not a case of concurrent findings of fact.

3. The landlords had filed a suit against the tenant and sub-tenant as defendant nos.1 and 2 respectively on the ground that the first defendant was a tenant of the suit premises which are let out for business purposes and that he had illegally sub-let the same to the second defendant and that therefore he is entitled to a decree for eviction. The suit was also based on the ground of arrears of rent of more than six months.

4. The defendants had filed their written statement at Exh.13 denying the averments made in the plaint, and specifically pleading that it was the first defendant who is the tenant of the suit shop, that it was the first defendant who was in possession of the suit shop, that the business being run in the suit shop was in the name of defendant no.2, that defendant nos.1 and 2 reside together since they are cousin brothers and are also in business together run in the suit shop. The said written statement also further goes on to state that though the first defendant is carrying on business in the name of the second defendant, the second defendant is

assisting the first defendant in the said business.

5. The trial court raised issues at Exh.15 and after recording the evidence and hearing the learned counsel for the parties, dismissed the suit on the ground of arrears of rent, inasmuch as the relevant issues were not pressed. However, on the ground of illegal sub-letting the trial court decreed the suit of the landlord by holding that the premises were let out for business purposes only to the first defendant, and that he had transferred possession of the same in favour of the second defendant, amounting to illegal sub-letting.

6. The defendants being aggrieved by the decree of eviction passed by the trial court, preferred an appeal under section 29(1) of the Bombay Rent Act before the District Court. The appellate court after reappreciating the evidence on record, dismissed the said appeal and confirmed the decree of eviction passed against the defendants by the trial court.

7. It is under these circumstances that the original defendants have preferred the present revision. As already stated hereinabove the revisional court can only examine the judgement and decree of the appellate court with a view to ascertain whether the same is in consonance with the principles of law and with a view to ensure that the appreciation of evidence on the part of the appellate court is not so grossly erroneous so as to amount to a perversity in law. Merely because another view on the appreciation of evidence is possible, that would not be sufficient justification for the revisional court to interfere with the judgement and decree of the lower appellate court.

8. In order that the relevant evidence on record can be appreciated in the correct perspective, it is first necessary to examine and analyse the pleadings of the parties. In this context it is necessary to set out that the case of the first defendant, as initially set out in his reply to the suit notice, is that although he is the tenant of the suit shop, he is doing business therein in the name of the second defendant. This admission is further strengthened as also clarified by the written statement Exh.13. Para 5 of the said written statement asserts that it is the first defendant who is the tenant of the suit shop. A similar assertion is made by the first defendant in his oral deposition at Exh.60. Thus, it is clearly established that the suit shop was in fact given on rent only to the first defendant, as asserted by the plaintiff-landlord. This point must be firmly kept in mind in order to avoid getting entangled in the confusion sought to be created by the defendants at a later stage of the suit, with a view to back out of this firmly established fact.

9. It appears that there is no dispute that the first defendant and the second defendant are cousin brothers, being the respective sons of real brothers, and thus having a common grandfather on their paternal side.

10. The evidence on record was sought to be interpreted by the defendants by putting forward a case (orally at the stage of arguments), that in fact it was the joint family which was the tenant of the suit shop, although the said tenancy stood in the name of the first defendant, and thus both the defendants have an equal right to occupy the suit premises. Under the circumstances it was suggested that it was not a case of sub-letting.

10.1 In this context it must be borne in mind that the specific case of the first defendant not only in the pleadings referred to hereinabove, but also in his oral deposition was that he was a tenant of the suit shop as an individual. It is also pertinent to note that he does not claim to be a tenant in his capacity as a Karta of the HUF, nor does he claim to have taken the premises on rent for and on behalf of the HUF. No such claim or contention has been raised by the first defendant by putting his case to the plaintiff during the cross-examination of the latter. More important is the fact that even in his oral deposition the first defendant has not put forth any such case. It, therefore, becomes obvious that this is merely a theory which has been created as an after-thought, and put up before the court during the hearing of the arguments. Under the circumstances the lower appellate court was right in refusing to accept the same, in the light of absence of the relevant pleading and evidence on record.

10.2 It is also pertinent to note that defendant no.2, under whose name the first defendant seeks to take shelter, has chosen not to examine himself on oath.

10.3 Another plea by way of an alternative case was sought to be made out on behalf of the defendants that the two defendants were joint tenants of the suit shop. As already discussed hereinabove, no such plea or averment was made either in the written statement of the defendants, nor was any such case even attempted to be made out in the evidence of the defendants.

11. The only reliance which could possibly be placed was on para 9 of the written statement at Exh.13 which only states that there is a joint family of defendant nos.1 and 2, that they are residing together in Wadhvan, that they are cousin brothers, that formerly the business was being carried on in the suit shop in the name of the first defendant, but since this business incurred losses, the name of the business was

changed to the name of the second defendant, and that the second defendant assists the first defendant in carrying on the business in the suit shop.

11. This averment made in the written statement, as already observed hereinabove, is not supported by any other oral or documentary evidence on record. Furthermore such an averment does not suggest that it was both the defendants who were joint tenants of the suit shop, nor does it suggest that the first defendant had taken the suit shop on rent for and on behalf of the joint family constituted of defendant nos.1 and 2. Furthermore, this averment also does not suggest that both the defendants were jointly doing business in the suit shop. Thus, such an averment remains an averment without much significance except that it is sought to be relied upon, in its vague and nebulous form, as a stepping stone for building and developing a hypothesis at the arguments stage, without the foundation or basis of any evidence on record.

12. Another theory rightly rejected by the lower appellate court, was the theory that the two defendants were co-tenants since they had a common grandfather on the paternal side. Once again it must be noted that this is a mere hypothesis forwarded at the arguments stage without any pleading or evidence on record. Furthermore, it is an admitted position that the original tenancy was not created in favour of the common ancestor of the two defendants, and thus there can be no question of the two defendants becoming co-tenants by way of transmission of such tenancy. It is an admitted fact that the first defendant was inducted into the tenancy as the sole tenant.

13. The lower appellate court has rightly appreciated the evidence to come to the conclusion that it is the second defendant who is in sole occupation of the suit shop. First of all it is an admitted position that the business is run in the name of the second defendant, although the tenancy stood in the name of the first defendant. Exh.50 is the application and Exh.51 is the certificate of registration issued under the Bombay Shops and Establishments Act. Exh.46 is the original application for this purpose made by defendant no.2. The application for registration is also signed by defendant no.2 and the said application is dated 28th October 1977. The relevant entry in column 9 of the application Exh.46 indicates that the second defendant had commenced business on the suit premises on 1st July 1977. These documents, therefore, clearly establish that it was since July 1977 that the second defendant started business in the suit premises, and that at least from this date he has been conducting his business from the same. Exh.51 is a licence issued under the said Act, issued in the name of the first defendant on 17h February

1969, in respect of his business carried on in the suit premises. Thereafter by Exh.50, the licence is issued in the name of the second defendant in respect of the same premises on 20th October 1977. Thus, the latter date clearly points to the change in the business name, transfer of the business, and the transfer of possession in favour of the second defendant by the first defendant. It may be noted in this context that after transfer of the name of the business in the name of the second defendant, it is nobody's case that the first defendant continues to have a interest in the same business and/or the first defendant had any interest in the business being conducted by the second defendant. As stated hereinabove, the second defendant has not stepped into the witness box, and the only case sought to be made out by the first defendant is that it was the second defendant who was assisting the first defendant in running the business, and not vice versa. The lame theory put up by the first defendant to explain this circumstances, is to state that although the name used was of the second defendant, it was the original business which was still continued to be run by the fist defendant. This is at best a hypothesis or a theory sought to be made out at the argument stage, inasmuch as there is no foundation found in the pleadings. Moreover, if this hypothesis had any justification whatsoever, the application for registration of the new business to be started in the name of the second defendant in the year 1977, would have been under the signature of the first defendant. However, the relevant application is signed by the second defendant.

14. Moreover, the plaintiffs had called upon the defendants by notice of inspection and production (Exh.65), to produce (inter alia) a copy of the application made by the second defendant to the Sales Tax Department for obtaining registration. The defendants did not produce nor gave inspection of such an application. Consequently, the appellate court rightly drew an inference adverse to the defendant inasmuch as had the said application been produced, it would probably have shown that it was only the second defendant who was running the business, or would have shown the second defendant as a sole proprietor of the business carried out from the suit shop.

15. The sales tax registration certificate at Exh.66 stands solely in the name of the second defendant, and in his personal capacity. Thus, this cuts across the various theories forwarded by the first defendant as being the owner of the business being run in the name of the second defendant.

16. The oral evidence on record of the case also goes against the defendants. The first defendant in his deposition at exh.60 states that the suit shop has been taken on rent in

his own name, that the second defendant resides with him, that they are having a common kitchen, and that their business is also joint. In contrast to this, the pleading made in the written statement Exh.13, and particularly para 9 thereof, is not only inconsistent, but also contradictory. The specific case of the first defendant in this context is that the defendant nos.1 and 2 are residing together, and the second defendant is assisting the first defendant in his business as an assistant. Even here, although the first defendant claims to be running the business, he does not assign any specific interest in the said business to the second defendant. When the aforesaid pleading is seen in the context of the averment made in para 6 of the defendants' reply to the suit notice, this inconsistency become all the more glaring. In the said paragraph the first defendant has asserted that the second defendant resides with the first defendant since a long time, that he assists the first defendant in the business of the first defendant, and that apart from this, the second defendant has no interest in the suit shop whatsoever.

17. Although the business run in the suit premises is admittedly in the name of the second defendant, and admittedly the business maintains books of accounts, no accounts or extracts of such accounts are produced on record. Thus, there is no evidence whatsoever that the business is joint or that the defendant no.1 has some interest in the business, although the same is standing in the name of the second respondent. An adverse inference may also be drawn from such non-production by a party in possession of the best possible and available evidence.

18. Thus, on the basis of the abovestated state of the evidence on record, there cannot be any doubt as to the application of the correct law to such facts. It is by now well settled that where it is found that a person other than the tenant is in exclusive possession of the premises, and carries on the business on his own account in the suit premises, and there is no other evidence to prove the nature of the occupation, the court would be justified in holding that the tenant has sub-let, assigned, or transferred his interest in the suit premises to such other person, and this would amount to unlawful sub-letting within the meaning of section 13(1)(e) of the Bombay Rent Act.

19. In the premises aforesaid, the judgement and decree of the lower appellate court is eminently sustainable and there is no justification whatsoever for interference in the present revision. Accordingly this revision is dismissed. Rule is discharged with no order as to costs. Ad interim relief vacated.

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